## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

NEW ENGLAND REGIONAL COUNCIL OF CARPENTERS, a/w UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

and CASE 1-CC-2712

VILLAGE CONSTRUCTION COMPANY INC.

Elizabeth Tafe, Esq., Counsel for the General Counsel Christopher N. Souris, Esq., Counsel for the Union Richard D. Wayne, Esq., Counsel for the Charging Party

## SUPPLEMENTAL DECISION

## Statement of the Case

I originally issued a Decision in this case on July 15, 2004. This involved the application of the Supreme Court's decision in *BE & K Construction Co.*, 536 U.S. 516, 532 (2002) to the allegation that a Union violated Section 8(b)(4)(ii)(B) by engaging in "coercive" conduct for a secondary object. I concluded that the Union's expression of an opinion in a public forum set up by the Massachusetts Department of Environmental Protection (DEP), in determining whether that agency would grant an amendment to a license, could not be construed as a "threat, restraint or coercion" as those terms are used in subsection (ii) of 8(b)(4).

The Board, at 351 NLRB No. 38, (2007), remanded this case to consider the matter in light of the Board's decision in *BE & K*, 351 NLRB No. 29 (2007). The Board stated:

The judge is directed to issue a supplemental decision addressing the question of whether the analysis we adopted in *BE & K* is applicable to the Union's filing of comments and an appeal with the DEP and, if so, whether the comments and appeal were reasonably based under the facts and circumstances of this case.

On December 12, 2007, I requested the parties to advice me as to how to proceed. In response, the General Counsel set forth her position that in light of the Board's decision in *BE & K*, she could not sustain the burden to show that the Respondent had violated the Act. (Obviously, the Respondent agreed). On the other hand, the Charging Party asserted that a violation had been committed, even under the new standards.

On January 3, 2008, having reviewed the respective position statements of the parties, I determined that a hearing would be required to resolve certain matters and that because the

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case had been opened and litigated, the General Counsel could not unilaterally withdraw the Complaint.

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On March 28, 2008, I conducted a conference call to determine what if any issues would be litigated at a hearing. I was advised by the Charging Party that it desired to adduce evidence of a new comment filed by the Union and that it wanted to amend the Complaint to allege this new transaction. The General Counsel and the Respondent advised that they had no additional evidence unless of course, I agreed with the Charging Party. I informed the parties that I did not believe that the Charging Party had the power to amend the Complaint. Nevertheless I permitted any party seeking to offer new evidence, to make motions with accompanying offers of proof. At the same time, I postponed the hearing pending any submissions.

On April 24, 2008, the Charging Party filed, (late), a Motion to amend the Complaint. It sought to add an additional allegation to the effect that on or about March 7, 2008, the Union, for a secondary object, filed with the Massachusetts DEP, frivolous and sham comments objecting to another amendment to the Salem Harbor Municipal Plan that had been approved on February 12, 2008. This Motion was opposed by both the Respondent and the General Counsel. The latter asserted that if the Charging Party wanted to allege new transactions as being violative of Section 8(b)(4)(B), it was required to file a new charge that would be investigated and evaluated by the Regional office. I agreed and on May 7, 2008, denied the Charging Party's Motion to Amend the Complaint. The General Counsel is the only party who has the right to amend a Complaint. *GPS Terminal Services*, 333 NLRB 968, 969-970 (2002) and *Kaumagraph Corp.*, 313 NLRB 624 (1993).

Having determined that no further evidence was required, I set a time for filing briefs. Having considered the briefs filed, I hereby make the following

## FINDINGS AND CONCLUSIONS

The first thing to remember is that in Massachusetts, an owner of tidal property does not have the absolute right to build on it. To do so, he or she must obtain a license from the Massachusetts Department of Environmental Protection, (DEP). That agency is given the authority to grant or deny permission to build, depending on a variety of factors including possible harm to the waterfront or the degree to which public access to the waterway is limited or impeded. Thus, the initial legally required step is for the owner to apply for a license that will permit construction. At that point, the DEP issues a notice whereby *any* group is invited to "comment" on the license application. In this regard, the evidence is that such persons may comment on the proposed license and express *any* opinion, regardless of how well or ill informed it may be.

Unlike a legal proceeding where a plaintiff who files a frivolous action may incur expenses under Rule 11, (in addition to having his lawsuit dismissed), persons making a "comment" in this licensing procedure are held to no standards at all and often make statements which are merely unfounded opinions. In this respect, the licensing procedure that invites public comment without regard to the legal concept of "standing" is more like a town meeting than the prosecution of a civil lawsuit which has a set of formally defined rules and procedures, usually requiring the expertise of people who are called lawyers.

In light of the above, I cannot imagine how imposing a Board enforced Order limiting the right of members of the public to express their opinions at a public forum about a public matter, would not be contrary to the Constitution's First Amendment's right of free speech and right to

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petition. Cf. Edward J. DeBartolo v. Florida Gulf Coast Building Trade Council, 485 U.S. 568, 580 (1988).

In the original decision, I opined that the only aspect of the DEP procedure that could conceivably be analogous to a lawsuit, (and therefore arguably coercive), would be the situation where an appeal was taken after the DEP decided to grant or amend a license. The reason is that by taking an appeal, the matter would then be elevated to a new level as it would be placed before an Administrative Law Judge. While I do not know the exact nature of such a proceeding, or how long it would take, it seemed to me that once this part of the procedure is invoked, then the parties would be propelled into a more formal and judicial type of procedure.

The Union's representative, (Falvey), sent a letter to the DEP on January 7, 2004 stating; "I hereby appeal the written determination to approve the above referenced application, which I believe violates 310 CMR 9.00 for the reasons that are contained in the comments that I submitted previously...." He followed this up on January 26, with another letter which had a more detailed expression of his arguments.

Notwithstanding Falvey's use of the word "appeal" in his letters, the fact of the matter is that neither the letter of January 7 nor the letter of January 26 can be construed as an "appeal" within the DEP's definition because *he did not request an adjudicatory hearing*. In fact, on February 13 and 20, 2004, Falvey expressly notified the DEP that he was *not* seeking an adjudicatory hearing. Thus, as there was no possibility of having an adjudicatory hearing, the appeal process was never really invoked and therefore any analogy to a lawsuit type of procedure cannot be made.

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In my initial opinion I expressed, rather pointedly, the conclusion that Falvey's comments to the DEP were "patently ridiculous." But on reflection, I think that this opinion was over stated. In substance, Falvey's main point was that by creating new permanent residences in a portion of the hotel, (instead of serving only seasonal transients), this could cause greater impediments to waterfront access by other local residents. (I assume that he is talking about the need to provide additional and all year round parking spaces for the new residents at or near the waterfront.)

The General Counsel, from the outset of this litigation, has never asserted that the Respondent's position before the DEP was baseless. In her current brief, she states that the General Counsel has;

[C]onsistently taken the position that the Union's comments and appeal could not be shown to be baseless, given the broad scope of the state environmental agency's discretion in licensing matters. Thus, regardless of Respondent's subjective state of mind or its intent, the General Counsel cannot show the filing of the comments and the subsequent appeal was baseless in an objective sense. On the facts of this case, it cannot be shown that "no reasonable litigant" – here no reasonable 10 citizens of Massachusetts –could [not] have expected success on the merits. As Respondents environmental comments and appeal cannot be shown to be objectively baseless, they cannot constitute an unfair labor practice, regardless of motive, after the Board's decision in *BE & K*.

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I am not familiar with the geography or congestion of the harbor where this construction was taking place. It may be that the pre-construction state of affairs was that there was limited access to the water because of the already existing usage by residents and tourists. As such, it

is difficult to determine when a tipping point is reached where congestion turns into gridlock. In any event, I think that it was a bit presumptuous of me to assert that Falvey's comments were completely without a rational basis. Maybe he was wrong. But I don't think that I can say that his assertions were without any basis at all.

For all of the reasons described above, I reaffirm my original decision and recommend that the Complaint be dismissed.  $^{\rm 1}$ 

Dated at Washington D.C., July 30, 2008.

Raymond P. Green Administrative Law Judge

<sup>&</sup>lt;sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.